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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. MICHAEL EUGENE VICKREY, Appellant.	)	2 CA-CR 2009-0328 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. CR200800470

Honorable Boyd T. Johnson, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General
By Kent E. Cattani and David A. Sullivan — Tucson
Attorneys for Appellee

Harriette P. Levitt — Tucson
Attorney for Appellant

K E L L Y, Judge.

¶1 Michael Vickrey appeals from his convictions and sentences for child molestation and sexual conduct with a minor. Finding no error, we affirm.

Background

¶2 We view the facts and all reasonable inferences therefrom in the light most favorable to upholding the verdicts. *See State v. Tucker*, 205 Ariz. 157, n.1, 68 P.3d 110, 113 n.1 (2003). In 2007, Vickrey, who was then twenty-seven years old, began a relationship with M.H., a fourteen-year-old girl who lived two houses away. In the winter of 2007, M.H. visited Vickrey in his room several times. On one occasion, he placed his hands under M.H.'s clothes and touched her genitals, while she simultaneously touched his genitals. The state charged Vickrey with child molestation and sexual conduct with a minor, both dangerous crimes against children. A jury found Vickrey guilty as charged. The trial court sentenced him to a mitigated term of eleven years' imprisonment for child molestation, and a consecutive, presumptive sentence of twenty years' imprisonment for sexual conduct with a minor.

Discussion

Jurisdiction/Venue

¶3 Although he did not raise the issue in the trial court, Vickrey now argues that the trial court lacked jurisdiction because the state failed to prove the offenses had occurred in Pinal County. A.R.S. § 13-109; *State v. Howe*, 69 Ariz. 199, 200, 211 P.2d 467, 468 (1949). This argument actually goes to venue, the proper county for the trial based upon where the conduct constituting the offense occurred, rather than subject matter jurisdiction, which is the power of the court to preside over the trial. A.R.S. § 13-109(A); *State v. Willoughby*, 181 Ariz. 530, 537 n.7, 892 P.2d 1319, 1326 n.7 (1995) ("Venue is question of whether trial court exercises jurisdiction in proper locality.").

Unlike subject matter jurisdiction, which may be raised at any time, *State v. Chacon*, 221 Ariz. 523, ¶ 5, 212 P.3d 861, 863-64 (App. 2009), "venue may be waived or changed," *Willoughby*, 181 Ariz. at 537 n.7, 892 P.2d at 1326 n.7. "The failure to object to venue before trial waives the issue on appeal." *State v. Girdler*, 138 Ariz. 482, 490, 675 P.2d 1301, 1309 (1983).

¶4 Vickrey concedes that he failed to preserve this issue in the trial court but claims he is entitled to have his conviction reversed because the state failed to prove venue was proper in Pinal County, and that this failure amounts to structural or fundamental error. Because Vickrey is wrong about the state's failure to prove venue, we need not consider whether any alleged error was structural or fundamental.

¶5 The record shows the state did present evidence that the offense had occurred in Pinal County. The owner of the house where the incident occurred testified that the address of that house was 11089 East Vah Ki Inn Road, Valley Farms, Arizona. A Pinal County Sheriff's deputy testified that this address was "within Pinal County." This was sufficient evidence that venue was proper in Pinal County. Thus, no error, much less structural or fundamental error, occurred.

Expert Witness

¶6 Vickrey next argues the trial court erred in permitting the state to introduce the testimony of expert witness Wendy Dutton. Dutton explained to jurors that the purpose of her testimony was to describe the general characteristics exhibited by children who are the victims of sexual crimes and testified she had not been given any factual details about the case. At trial, Vickrey objected to Dutton's testimony on the grounds

that it was irrelevant and lacked foundation because she had no personal knowledge of the victim's mental state. After the prosecutor explained that the purpose of Dutton's testimony was to give a broader understanding to the jury about child victimization, the court overruled Vickrey's objection. "We review the trial court's ruling on expert testimony for a clear abuse of discretion." *State v. Hyde*, 186 Ariz. 252, 276, 921 P.2d 655, 679 (1996).

¶7 Vickrey argues the trial court erred when it overruled his objection, and also claims Dutton's testimony should have been precluded because it was within the understanding of the lay juror, amounted to vouching for the credibility of the victim, and Dutton had no special qualifications as an expert. He argues that "Dutton's testimony about the process of victimization [was] particularly prejudicial towards [him]" because M.H. "c[ould] hardly be described as a vulnerable, unsophisticated child," did not "disclose in piecemeal, . . . did not display script memory, and . . . [had] initiated the relationship."

¶8 M.H. testified she and Vickrey had "kn[own] it was wrong to be with each other," and had agreed to keep the relationship a secret. Vickrey specifically told M.H. that she must keep the secret because "he would end up getting in trouble," and threatened to kill himself if their relationship was discovered. Vickrey wrote five letters to M.H. professing his love for her, four of which she destroyed, and one of which was discovered by her parents, who reported the events to the police. M.H. also testified that the first few days she had visited Vickrey, they had not engaged in physical contact. On her fourth visit to Vickrey's room, he greeted her with a closed-mouth kiss. The next

day, he greeted her with an open-mouth kiss. Soon thereafter, Vickrey asked M.H. to have sexual intercourse with him, but she refused. On a subsequent visit soon thereafter, Vickrey asked M.H. if she "wanted to touch him in any way," and they then touched each others' genitals.

¶9 Thus, Dutton's testimony, including her description of the five steps of the victimization process—victim selection, engagement, grooming, assault, and concealment—was relevant to help the jury understand the general behavior of perpetrators and victims. *See* Ariz. R. Evid. 401 (evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence"); *State v. Rojas*, 177 Ariz. 454, 459, 868 P.2d 1037, 1042 (App. 1993) (testimony about general characteristics of sexual-abuse victims admissible to help jury understand behavior of such victims). Because Dutton's testimony was relevant and the trial court reasonably could have concluded any danger of unfair prejudice did not substantially outweigh its probative value, the admission of her testimony was not error on grounds of irrelevance. *See* Ariz. R. Evid. 403.

¶10 As the state asserts, Vickrey's remaining arguments are subject only to fundamental error review because he failed to raise them in the trial court. *See State v. Lopez*, 217 Ariz. 433, ¶ 4, 175 P.3d 682, 683 (App. 2008) ("[A]n objection on one ground does not preserve the issue on another ground."); *State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607 (2005). Fundamental error is "'error going to the foundation of the case, error that takes from the defendant a right essential to his defense, and error

of such magnitude that the defendant could not possibly have received a fair trial.'" *Id.* ¶ 19, *quoting State v. Hunter*, 142 Ariz. 88, 90, 688 P.2d 980, 982 (1984). To prevail on fundamental error review, Vickrey must establish that such error exists and that the error caused him prejudice. *See Henderson*, 210 Ariz. at 567, ¶ 20, 115 P.3d at 607.

¶11 Vickrey fails to argue in his opening brief that fundamental, prejudicial error occurred, thereby waiving his arguments on the other three grounds. *See State v. Moreno-Medrano*, 218 Ariz. 349, ¶ 17, 185 P.3d 135, 140 (App. 2008) (concluding argument waived because defendant "d[id] not argue the alleged error was fundamental"). Vickrey does not avoid waiver by arguing fundamental error in his reply brief. *State v. Ruggiero*, 211 Ariz. 262, n.2, 120 P.3d 690, 695 n.2 (App. 2005) ("Generally an issue raised for the first time in a reply brief is waived."). Furthermore, we independently have found no fundamental error. *State v. Fernandez*, 216 Ariz. 545, ¶ 32, 169 P.3d 641, 650 (App. 2007) (court will not ignore fundamental error it discovers).

Sentencing

¶12 Finally, Vickrey contends he was entitled to a mitigated sentence on count two, sexual conduct with a minor. The trial court explained it was required to impose consecutive sentences and that it believed a thirty-one-year sentence was appropriate. It imposed a mitigated prison term of eleven years on count one and a presumptive term of twenty years on count two, without identifying either mitigating or aggravating factors, in order to achieve the prison term that totaled thirty-one years.

¶13 A trial court has broad discretion to determine an appropriate sentence within statutory limits. *State v. Fillmore*, 187 Ariz. 174, 184, 927 P.2d 1303, 1313 (App. 1996). A reviewing court will not modify or reduce a sentence that is within statutory limits unless the trial court has clearly abused its broad discretion. *State v. Cameron*, 146 Ariz. 210, 215, 704 P.2d 1355, 1360 (App. 1985). A court abuses its sentencing discretion by acting arbitrarily or capriciously or failing to investigate relevant facts. *State v. Ward*, 200 Ariz. 387, ¶ 6, 26 P.3d 1158, 1160 (App. 2001).

¶14 Vickrey contends that the "court acted contrary to the mandates of A.R.S. § 13-701(F)," which states in relevant part:

> In determining what sentence to impose, the court shall take into account the amount of aggravating circumstances and whether the amount of mitigating circumstances is sufficiently substantial to justify the lesser term. If the trier of fact finds aggravating circumstances and the court does not find any mitigating circumstances, the court shall impose an aggravated sentence.

¶15 Vickrey argues "the trial court gave improper weight to aggravating circumstances and disregarded mitigating circumstances it was obliged to consider." As we previously noted, the trial court did not find any aggravating or mitigating circumstances existed as to either count. Although Vickrey presented evidence that he had been involved in an accident that had resulted in a brain injury and asserted that his only crime was "[f]alling in love," the court was only required to consider this evidence; a court is not obliged to find mitigating circumstances exist simply because mitigating evidence is presented. *See State v. Cazares*, 205 Ariz. 425, ¶ 8, 72 P.3d 355, 357 (App. 2003). The weight to be given any factor asserted in mitigation "is a matter within the

sound discretion of the sentencing judge." *State v. Towery*, 186 Ariz. 168, 189, 920 P.2d 290, 311 (1996).

¶16 For that reason, we reject Vickrey's contention that the trial court erred in failing to give substantial weight to his mental condition as it related to the instant offenses as a mitigating factor in sentencing. The record does not demonstrate that the court failed to investigate relevant aggravating and mitigating factors or acted arbitrarily or capriciously in weighing them before reaching its decision. We therefore have no basis on which to conclude the court abused its discretion. *See Ward*, 200 Ariz. 387, ¶ 6, 26 P.3d at 1160.

Disposition

¶17 Vickrey's convictions and sentences are affirmed.

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge

CONCURRING:

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Presiding Judge